CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TERRY JESS DENNIS, by and through KARLA BUTKO, as Next Friend,

Petitioner-Appellant,

vs.

MICHAEL BUDGE, Warden, and BRIAN SANDOVAL, Attorney General of the State of Nevada,

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ
(Nevada, Las Vegas)

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**

**MOTION FOR STAY OF EXECUTION**

**EXECUTION SCHEDULED FOR JULY 22, 2004, 9:00 P.M.**

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## CIRCUIT RULE 27-3 CERTIFICATE

1. Counsel:

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2. The execution of petitioner Terry Dennis is scheduled for July 22, 2004, and relief cannot be obtained in the normal course of motion practice under Fed. R. App. P 27(a)(3) and Circuit Rule 27-1.

3. Counsel for the Appellees - Respondents have been notified by telephone that this motion will be filed and counsel is being served with this motion by facsimile and electronic mail.

4. A stay of execution was sought in the District Court in connection with the petition for writ of habeas corpus, and the District Court denied the stay request when it dismissed the Petition. XI ER 1768, 1903.

## MOTION FOR STAY OF EXECUTION

Petitioner Terry Dennis, by and through Karla Butko as next friend, hereby moves for a stay of execution. This request is based upon the attached memorandum of points and authorities and the entire file in this matter.

## MEMORANDUM OF POINTS AND AUTHORITIES

On July 6, 2004, the district court dismissed a petition for writ of habeas corpus on the ground of Ms. Butko's lack of standing to litigate the petition on behalf of Terry Dennis. A notice of appeal was filed on July 6, 2004. On July 7, 2004, the district court *sua sponte* granted a certificate of appealability to allow the appeal to proceed. XI ER 1903, 1907. Mr. Dennis' execution is scheduled for Thursday, July 22, 2004, at 9:00 p.m.

This Court is authorized to impose a stay of execution "after final judgment ... or pending appeal" 28 U.S.C. § 2251, to allow the appellate proceedings to be litigated before they are rendered moot by the inmate's execution. When an appeal presents a "substantial" issue, a stay should be entered "when necessary to prevent the case from becoming moot by the petitioner's execution...." Barefoot v. Estelle, 463 U.S. 880, 893-894 (1983); Lonchar v. Thomas, 517 U.S. 314, 320-321 (1996). Whether an appeal presents a "substantial" question does not focus upon the fact that the district court has denied relief but on whether the appeal presents questions that are

"debatable":

> "In requiring a "question of substance," or a "substantial showing of the denial of [a] federal right" obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further.""

Barefoot , 463 at 893 n. 4 (citations omitted).

The district court granted a certificate of appealability *sua sponte* in this case, XI ER 1907, and the standard for granting a certificate of appealability is the same as the standard for granting a stay pending appeal. See Barefoot, 463 U.S. at 893-894; see also Slack v. McDaniel, 529 U.S. 473, 483-484 (2000) (Barefoot standard applies to certificate of appealability).

Pursuant to this Court's order, counsel for appellant-petitioner, through his next friend, has filed a brief arguing why the district court erred in dismissing the habeas corpus petition on the ground of the next friend's lack of standing. In that brief, counsel argued that the state competence proceeding was defective under Taylor v. Maddox, 366 F.3d 992, 998-1008 (9th Cir. 2004), and that the state court findings are not entitled to a presumption of correctness under 28 U.S.C. § 2254 (e)(1). The only mental health expert who has examined Mr. Dennis on the issue of his competence to seek his own execution, Dr. Bittker, has concluded that Mr. Dennis' decision is a

product of his mental disorder. X ER 1601-1603; XI ER 1859-1860. Cf. Demosthenes v. Baal, 495 U.S. 731, 735-736 (1990) ("conclusory" affidavit from psychiatrist who had not examined inmate asserting only that inmate "may" be incompetent); Brewer v. Lewis, 989 F.2d 1021, 1025-1027 (9th Cir. 1993). Dr. Bittker testified in the district court (in testimony not considered by the state courts) that Mr. Dennis acknowledged that he did not "have the courage to carry through the desire [to commit suicide], so the state becomes the vehicle for suicide." XI ER 1857.

Under these circumstances, there is ample reason to question the accuracy of the state court's finding of competence sufficient to justify the granting of a stay, under the any view of the standards for imposing a stay. See Vargas v. Lambert, 159 F.3d 1161, 1167-1168 (9th Cir. 1998) (finding "meaningful" new evidence of incompetence since state competence finding), stay vacated 529 U.S. 925 (1998); id. at 1171-1172 (Kleinfeld, J., dissenting) (finding no "meaningful" new evidence of incompetence); Brewer v. Lewis, 989 F.2d at 1025-1027.

Appellant has argued the merits of the standing issue in the opening brief, which shows that the district court's judgment should be reversed. A fortiori, a stay should be granted to allow the next friend petition to be fully litigated. Accordingly,

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appellant submits that this Court should grant a stay of execution pending disposition of the pending appeal and the proceedings on remand.

Respectfully submitted this 12th day of July, 2004.

FRANNY A. FORSMAN
Federal Public Defender

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